ORIGINAL

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of	)	
	)	
Streamlining Broadcast EEO	)	
Rules and Policies, Vacating the EEO	)	MM Docket No. 96-16
Forfeiture Policy Statement	)	
and Amending Section 1.80 of	)	
the Commission's Rules To Include	)	
EEO Forfeiture Guidelines	)	

To: The Commission

REPLY COMMENTS OF THE LUTHERAN CHURCH - MISSOURI SYNOD

The Lutheran Church - Missouri Synod (the "Church"), licensee of Stations KFUO(AM) and KFUO-FM, Clayton, Missouri (sometimes collectively "KFUO"), by its attorneys and pursuant to Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415, 1.419, hereby submits its reply comments in response to the above-captioned Order and Notice of Proposed Rule Making (the "NPRM"), released February 16, 1996.

1. The Church is gratified that dozens of those submitting comments in this proceeding have supported the position that the Commission should clarify its EEO requirements by stating that religious licensees have the right to use religious knowledge or affiliation as a qualification for any job positions for which those licensees deem it appropriate to serve their religious missions. Two of the comments, however, those filed by the American Jewish Congress ("AJC") and the Americans United for Separation of Church and State ("AUSCS"), argue that the Commission should not make this clarification, and that it is not required by statute or caselaw. For the following reasons, the AJC and AUSCS are wrong.

2. The AJC and AUSCS contend that the Church and the National Religious Broadcasters ("NRB") seek a broader exemption than the Supreme Court held was permissible in Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987) ("Amos"). However, this is not the case. AJC and AUSCS are wrong when they argue that Amos held that section 702 of Title VII could constitutionally exempt only the "non-profit" activities of religious organizations. Rather, the Court held in Amos that section 702 was constitutional as applied to non-profit activities, which were the only activities at issue, but did *not* state that the result would have been different for profit making activities of a religious organization. It should be noted that later court of appeals opinions addressing the issue have *not* held that a religious organization can have religious job criteria only for "non-profit" or "non-commercial" activities, and have *not* interpreted the Amos decision to suggest such a limitation. Instead, courts have held that *all* the job functions of a religious organization are exempt under 702 from the strictures on religious discrimination. EEOC v. Townley Engineering & Manufacturing Company, 859 F.2d 610 (9th Cir. 1988); accord EEOC v. Kamehamera Schools/ Bishop Estate, 990 F.2d 458 (9th Cir 1993). This is the same exemption that the NRB and the Church seek.

3. To be sure, the later court of appeals decisions have stated that section 702 applies by its terms only to religious, not secular, institutions. But this is *consistent* with the Church's proposed clarification, which exempts only broadcast stations owned by religious organizations, not organizations that are essentially secular. Stations such as KFUO, which are part of the most classic form of religious organization and whose main function is as a ministry to support the Church and to nurture Christian faith, have a clear right to the exemption. The AJC and AUSCS are wrong to suggest that a religious organization loses the section 702 exemption -- and forfeits

its fundamental right to define for itself how to best serve its religious mission in its broadcast ministry -- when its station becomes in any way "commercial." A church's broadcast ministry remains entitled under the First Amendment, the Religious Freedom Restoration Act ("RFRA") and the national policy established by section 702 of Title VII, to determine which of its job functions should have religious qualifications, even if the church decides -- as the Church did in connection with KFUO-FM -- that it needs to accept some advertisements on its station because voluntary contributions have proved insufficient to support station operations.

4. AUSCS, but not the AJC, also contends that the FCC's mandate to ensure that stations are operated in the "public interest" (a) justifies the Commission in taking a different position than Congress established under Title VII and (b) permits the FCC to second-guess religious organizations' judgments about which functions at their stations warrant religious hiring preferences. This is erroneous. Under both the First Amendment and the RFRA, religious associations have the right to make their own good faith judgments as to which job positions need religious knowledge in order to best serve the organization's mission, free of Governmental entanglement. The courts have held that religious groups' right to make such judgments "is 'vital' to the group's religious mission and the ability of the group to define itself on the basis of shared faith ...." See Hsu v. Roslyn Union Free School Dist. No. 3, 85 F.3d 839, 869 (2d Cir. 1996), quoting Amos, 483 U.S. at 342-43 (Brennan, J., concurring). The Governmental entanglement that results from usurpation of a religious association's judgment about which job functions need religious knowledge leads to the constitutionally untenable situation where a religious "community's process of self-definition ... [is] shaped in part by the prospects of litigation." Amos, 483 U.S. at 342-43 (Brennan, J., concurring).

5. AUSCS is wrong when it claims that the Court's decision in Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) ("Red Lion") means that the FCC has the power to invade the fundamental rights of self-definition of religious associations that become broadcast licensees. In Red Lion, the Court upheld the validity of the fairness doctrine on the ground that the FCC could find that it was necessary to achieve the public interest in free expression of ideas and a balanced presentation of information on issues of public concern. See Tribe, American Constitutional Law (2d Ed.) § 12-25 (categorizing Red Lion as addressing the issue of the need for governmental action to facilitate expression and criticizing the holding of the case). But the Court has made it clear that FCC regulation of broadcasting must be narrowly tailored to achieve a substantial governmental interest such as the free expression of ideas. FCC v. League of Women Voters, 466 U.S. 364, 380 (1984). And the AUSCS does not and cannot show that there is a substantial governmental interest in usurping the right of a religious licensee to determine which job functions need religious knowledge in order to best serve the religious association's mission.

6. Contrary to the AUSCS's suggestion, churches do not waive their religious freedoms when they are licensed broadcasters, especially given the vital importance of broadcast stations to First Amendment freedoms. For, as the Minority Media and Telecommunications Council and other groups themselves pointed out in their motion to the FCC to reconsider and clarify the NPRM (at page 12): "one's First Amendment freedoms lack potency without ... access to the stream of mass communications," which possess "essential" "cultural, social, and political significance." This is true as much for churches as for other broadcasters; and it is outrageous to suggest that a church waives its rights by deciding to use an essential means of *effectuating* those rights.

7. The AUSCS apparently believes that there is a substantial public interest in a governmental requirement of "religious diversity" at each and every broadcast station in the United States. But the AUSCS cites no authority for this preposterous contention, and does not and cannot explain how such a requirement would lead to program diversity or enhance the public interest. There is no public interest in ensuring religious diversity at stations owned by religious associations. Indeed, as the Court of Appeals for the Second Circuit has very recently stated in a somewhat different context, the opposite is true: "The state's accommodation of religious discrimination by a religious group allows that group to define and express itself in religious terms -- a state motivation that is benign and a state purpose that is legitimate." Hsu v. Roslyn Union Free School Dist. No. 3, 85 F.3d at 869. Indeed, allowing religious licensees to use religious preferences where they believe it is appropriate will *increase* diversity by permitting religious organizations to keep a unified sense of organizational mission without fear of Governmental interference, and thus to more effectively add a unique perspective to the

programming universe.[1/]

[1/] The comments very belatedly filed by the Minority Media and Telecommunications Council ("MMTC") on September 17, 1996, do not address whether the Commission should clarify its EEO Rule in the manner proposed by the Church and the NRB. There are, however, several erroneous statements in MMTC's comments concerning the Church, and concerning the caselaw relating to religious job qualifications, which require a brief reply:

- On pages 185-86 and 260 of its comments, MMTC suggests that the Commission has made certain adverse "findings," or "recognized" certain unfavorable facts about the Church and KFUO. This is false. The MMTC's citations are to an HDO, 9 FCC Rcd 914 (1994), which merely made *allegations* to be tested at hearing. See Cleveland Television Corp. v. FCC, 732 F.2d 962, 973 n. 13 (D.C.Cir. 1984) (statements in HDO are mere allegations rather than findings). Particularly irresponsible is the discussion at pages 185-86 of MMTC's comments, which implies that the Commission has "found" that the Church "probably" discriminated. In fact, the precise opposite is true. After a hearing, the ALJ found: "There is not one scintilla of evidence in the record to indicate that any adverse discriminatory act ever occurred, or that any individual ever made an allegation of racial or other discrimination regarding [KFUO's] employment practices." Initial Decision, FCC 95D-11 at ¶ 194 (released September 15, 1995). And the Review Board stated: "[W]e agree with the ALJ that the history of the Lutheran Church and Missouri Synod demonstrates an aggressive attitude against racism, and a continuous outreach toward African American families, including creating a Commission on Black Ministry that was designed to expand the Church's African American membership; and that the policy was applicable to the [Church's] radio stations." Review Board Decision, 11 FCC Rcd 5275 (1996) at ¶ 30.

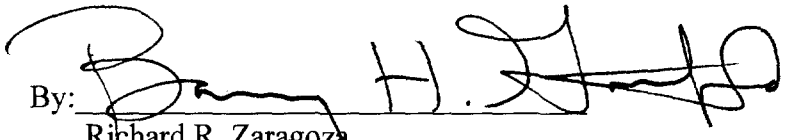
- In note 154 of its comments (at page 151), MMTC states that the Commission "took away" a station's license because of religious discrimination, citing "King's Garden (MO&O), 34 FCC 2d at 237." The cited page, however, contains a different case, having nothing to do with EEO. Assuming that MMTC intends to refer to the King's Garden letter ruling at 34 FCC 2d 937, its statement is *still* wrong -- in that ruling, the Commission imposed no sanction, much less a license revocation, because of the licensee's use of religious job criteria for hiring. Instead, the Commission merely directed the licensee to file a report of its future hiring practices and policies under the requirements of the EEO Rule as interpreted by the letter ruling. 34 FCC 2d at 938-39.

CONCLUSION

For all the above reasons, and for the reasons given by the Church, the NRB and many others in their comments in this proceeding, the Commission should clarify its EEO Rule to state that religious organizations have the right to use religious knowledge or affiliation as a qualification for any job positions for which those licensees deem it appropriate to serve their religious missions.

Respectfully submitted,

THE LUTHERAN CHURCH - MISSOURI SYNOD

By: 

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CERTIFICATE OF SERVICE

I, Marionetta Holmes, a secretary for the firm of Fisher Wayland Cooper Leader & Zaragoza L.L.P., do hereby certify that I have this 25th day of October 1996, mailed by First Class, United States mail, postage paid, the foregoing **"REPLY COMMENTS OF THE LUTHERAN CHURCH-MISSOURI SYNOD"** the following:

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***VIA HAND DELIVERY**